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NO. 89-7302

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

TOMMY CAGE,

Petitioner

VERSUS

STATE OF LOUISIANA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

SUPPLEMENTAL BRIEF IN OPPOSITION BY THE STATE OF LOUISIANA

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ARGUMENT

The Court has asked for a supplemental response to question 2 presented by the Petitioner. In that question, Petitioner alleged that he was deprived of his constitutional right to due process of law because the Louisiana state trial court improperly instructed the jury regarding reasonable doubt.

Petitioner's objection to the trial judge's instructions on reasonable doubt was overruled. The trial judge charged the jury as follows:

> Ladies and Gentlemen, the Defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt.... If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty. If after giving a fair and impartial consideration to all the facts in the case you find the evidence unsatisfactory or lacking of one any single point indispensibly necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty. (Emphasis added.)
>
> State v. Cage, 554 So.2d 39 (La. 1989), at 41

The Louisiana Supreme Court held that the use of "grave uncertainty" and "moral certainty," if taken out of context, might overstate the requisite degree of uncertainty and confuse the jury. State v. Cage, supra, 554 So.2d at 41. However, taking the charge as a whole, that Court found that reasonable persons of ordinary intelligence would understand the definition of "reasonable doubt" given by the trial court. That has been the test for jury charges in Louisiana. State v. Taylor, 410 So.2d 224 (La. 1982). See also: State v. Stramiello, 392 So.2d 425 (La. 1980). Similar instructions using these terms have been upheld by the Louisiana Supreme Court. State v. Messiah, 538 So.2d 175 (La. 1988), opinion by Justice Calogero at ftnte 5, 538 So.2d at 184; Taylor, supra.

This Court has held that in interpreting the meaning of a jury charge a court must determine "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307, 316 (1985).

The State of Louisiana submits that the jury charge on reasonable doubt given in this case should not mislead or confuse a juror, and is constitutional. The harmless error doctrine of Chapman v. California, 386 U.S. 18, 24 (1967) should not apply because no error was committed by giving the jury charge.

The instructions must be reviewed in the context of the overall charge. Cupp v. Naughten, 414 U.S. 141, at 146-147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); United States v. Park, 421 U.S. 658, 674, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975).

Petitioner calls attention to six federal appeals court decisions (brief, pps. 17, 18) which he argues recognize that analogous reasonable doubt definitions are error. The State disagrees, and now reviews each of these decisions in the order submitted by Petitioner.

In United States v. Byrd, 352 F.2d 570 (1965) the Second Circuit held that a trial court erred in its failure to properly charge the jury regarding criminal intent. That court commented on various additional parts of the jury charge, without ruling on these additional parts. Byrd, 352 F.2d at 574. One comment made by the court concerned an alternative definition of reasonable doubt offered by the trial court: "It is a doubt to a moral certainty." Byrd, 352 F.2d at 575. The court pointed out that "doubt" and "certainty" are antithetical and the use of them "in this manner and for this purpose" would tend to create more confusion than light in the minds of the jury. Byrd, 352 F.2d at 575.

The brief comment of the circuit court in Byrd does not reveal the context in which the "alternative definition" was used. The State points out, however, that no such alternative definition was offered in the jury charge now being considered by this Court. There are no "antithetical words" in the language used to define reasonable doubt by the trial court below. For this reason, Byrd does not apply.

While the First Circuit in **Dunn v. Perrin**, 570 F.2d 21 (1978) did hold a conviction to be invalid on the ground that there was a possibility that the jury was misled, as Petitioner claims in brief, the Court in **Dunn** did not base its decision on language similar to the language used in the jury charge now before this Court. The Court found that reasonable doubt was improperly defined three times during the jury charge, 570 F.2d at 25, but the Court expressly refused to find error in charging the jury regarding the term "moral certainty." The **Dunn** court held that while authorities differ on the advisability of equating proof beyond a reasonable doubt with establishment of guilt to a moral certainty, it "need not take sides in that controversy...." **Dunn**, 570 F.2d at 24. It did not take sides in that controversy, and did not base its decision on that issue.

Petitioner cites two other First Circuit cases, **United States v. Harrigan**, 586 F.2d 860 (1978), and **Lanigan v. Maloney**, 853 F.2d 40 (1988) in support of his argument. **Harrigan** involved an erroneous instruction that the defendant's evidence had no greater function than simply to raise a reasonable doubt in the minds of the jurors. It had nothing to do with the concepts of "grave uncertainty" or "moral certainty" at issue in the case before this Court. **Lanigan** found error in a jury charge which, reduced to its basics, told the jurors that proof beyond a reasonable doubt meant that the defendant's guilt had to be

proven not merely by conjecture or guesswork but "to a degree of moral certainty." **Lanigan**, 853 F.2d at 46. The primary problem, the court held, was the use of the phrase "to a degree of moral certainty." Said the court, "The judge's instruction essentially told jurors that they needed some undefined amount of - 'a degree of' - moral certainty to find petitioner guilty." **Lanigan**, 853 F.2d at 46, 47. Indeed, the **Lanigan** court stated that the First Circuit has not found use of the phrase "moral certainty" to be constitutional error, citing **United States v. Drake**, 673 F.2d 15, 21 (1st Cir. 1982); **United States v. Indorato**, 628 F.2d 711, 720-721 (1st Cir. 1980); and **United States v. Ariza-Ibarra**, 605 F.2d 1216, 1228 (1st Cir. 1979). **Lanigan**, 853 F.2d at 47, ftnte 4.

In **United States v. Wosepka**, 757 F.2d 1006 (9th Cir. 1985) the Ninth Circuit held, as Petitioner alleges, that a brief jury instruction merely defining reasonable doubt as "a doubt based on reason and common sense" was constitutionally inadequate. The case contains no reference, however, to the definition of reasonable doubt charged by the trial court in the case before this Court. The State finds no language in that decision which might be instructive here.

The State submits that these decisions, relied on by Petitioner, do not control or substantially assist in determining the constitutionality of the jury charge on reasonable doubt given by the trial court below.

"Grave uncertainty" does not define the quantum of uncertainty but rather the nature of the uncertainty. "Grave", with its common dictionary meaning of serious, or important, is descriptive of the type of uncertainty present when a reasonable doubt exists. By using the term, the trial court below contrasted this doubt with a doubt based upon "mere caprice and conjecture." State v. Cage, supra, 554 So.2d 39, at 41.

The sentence in the jury charge containing the term "moral certainty" does not change the meaning of the standard defined by the court. The sentence in question reads: "What is required [in order to convict] is not an absolute or mathematical certainty, but a moral certainty." In context, the trial court was telling the jurors that they should not apply a mathematical formula to the reasonable doubt standard but should be morally certain of the defendant's guilt before convicting him.

The judge below wanted jurors at the conclusion of the trial to be able to go home with the abiding conviction that they could be at ease about what they had done because they were certain they were right if they convicted the defendant. Thus, they must be convinced to a "moral certainty" of the defendant's guilt before finding him guilty beyond a reasonable doubt. Seen in context the charge is not only constitutionally permissible but is favorable to the defense.

The State has found no federal circuit court decisions in which the terms contested here, when used as they were used by the court below, were held to be constitutional error.

Some courts have criticized use of the terms "moral certainty" and "reasonable moral certainty," U.S. v. Love, 767 F.2d 1052 (C.A. 4 1985), cert. den. 106 S.Ct. 848, 474 U.S. 1081, 88 L.Ed.2d 890, cert. den. Lee v. U.S., 106 S.Ct. 849, 474 U.S. 1081, 88 L.Ed.2d 890; U.S. v. DeVincent, 632 F.2d 147 (C.A. 1, 1980), cert. den. 101 S.Ct. 405, 449 U.S. 986, 66 L.Ed.2d 249, but such courts have held that the use of these phrases did not reach the level of legal or constitutional error. The federal First Circuit has frequently discussed this issue. See: U.S. v. Drake, 673 F.2d 15 (CA 1, 1982); Bumpus v. Gunter, 635 F.2d 907, cert. den. 101 S.Ct. 17141, 450 U.S. 1003, 68 L.Ed.2d 207 (CA 1, 1980); U.S. v. Indorato, 628 F.2d 711, 720-721 (1st Cir. 1980); U.S. v. Ariza-Ibarra, 605 F.2d 1216, 1228 (1st Cir. 1979).

Imperfect formulation of the reasonable doubt instruction may meet constitutional requirements when viewed in the context of the entire charge. See, e.g., United States v. Glantz, 847 F.2d 1, 11-12 (1st Cir. 1988); United States v. Glenn, 828 F.2d 855, 861 (1st Cir. 1987); United States v. Munson, 819 F.2d 337, 345-346 (1st Cir. 1987); United States v. Drake, supra; Bumpus v. Gunter, supra.

Petitioner has demonstrated no constitutional error in the jury charge on reasonable doubt given in the trial court below.

CONCLUSION

The petition for certiorari should be denied. There is presently no conflict among the federal circuit courts of appeal on the jury charge at issue and no substantial federal question has been presented for review.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of this Supplemental Brief has been served upon counsel for petitioner by placing a copy of same in the United States Mail, postage prepaid, addressed to:

Hon. Henry D. Gabriel
School of Law,
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526 Pine Street
New Orleans, Louisiana 70118

This 7th day of Sept., 1990.

New Orleans, Louisiana

JACK PEEBLES
ATTORNEY FOR RESPONDENT

SUPREME COURT OF THE UNITED STATES
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Re: Tommy Cage v. Louisiana, No. 89-7302

Dear Mr. Peebles:

Although you have filed a brief in opposition to the petition for a writ of certiorari in the above case, the Court has directed this office to request a response as to question 2 presented by the petition.

Ten typewritten or otherwise reproduced copies of your response, together with proof of service thereof, should reach this office on or before September 12, 1990.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

Joseph F. Spaniol, Jr.
Clerk

cc: Henry D. Gabriel, Esq.
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